91-1905 (3)

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. _____

JOHN CARVER, AL SAMPSON,
BILL McCLUNG, DONALD J. MEYERS,
and MARTIN L. HAGOOD

Petitioners

v.

WESTINGHOUSE HANFORD COMPANY,
a corporation;
HANFORD OPERATIONS AND ENGINEERING PLAN

Respondents.

VOLUME 2 OF 3
APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
UNITED STATES

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employees will be notified of their assignments through employment confirmation notices. The Westinghouse Human Resources staff is preparing to issue these notices with one of our May paychecks.

The employment confirmation notices will inform employees of their work assignments and ask whether they wish to accept or decline employment with Westinghouse Hanford. In addition, employees will be asked to sign a release allowing their personnel records to be transferred from their current employer to Westinghouse. At the time employees receive their employment confirmations from Westinghouse, they also will be given new Conflict of Interest and Patent/Information Disclosure agreements to sign and return to Human Resources.

One last reminder: personnel assignments are being made in layers. Yours is coming too -- by the end of May at the latest.

An Information Source For Employees of BCS Richland, Inc., Rockwell Hanford Operations, UNC Nuclear Industries, Inc. and Westinghouse Hanford Company
Published by Rockwell Internal Communications and
Westinghouse Communication Services.

JUNE 29 TO BE TAKEOVER DATE

June 29th has now been designated as the effective contract takeover date -- the date that Westinghouse assumes responsibility for all operations currently being managed by the present Operations and Engineering contractors. This date will replace the July 1 date because it coincides with the fiscal month.

HANFORD TO BE IDENTIFIED AS NEW WESTINGHOUSE BUSINESS UNIT

It's official! Westinghouse's operations here have been designated as the Hanford Business Unit, directed by Dr. W. M. Jacobi.

Under Westinghouse's organizational structure, business units are autonomous businesses, comprising similar operations that focus on a single segment of the business. This structuring ensures more effective strategic planning and resource allocation.

At the time Westinghouse was selected to manage the consolidated Hanford contract, Dr. Jacobi was general manager of the Advanced Power Systems Divisions. APSD also was a business unit, comprised of two commercial divisions and five government contractor operations, including Westinghouse Hanford.

With Westinghouse's selection for the O&E contract here, it was announced that Dr. Jacobi will head the new corporate business unit. His APSD organization was disbanded, and the divisions that had reported to him were realigned with other Westinghouse business units. Dr. Jacobi, a vice president of Westinghouse Electric Corporation, becomes president of the Westinghouse Hanford Company on the June 29 contract takeover date.

PAUL MATTHEWS ANSWERS YOUR QUESTIONS ABOUT CONSOLIDATION

The following employee questions are among those most frequently asked of Paul Matthews and the Westinghouse Human Resources staff. If you have additional questions or concerns, you may wish to call the Consolidation Hotline at 6-7727.

Q. Where will the BWIP organization

fall within Westinghouse?

A. BWIP will become our Civilian Waste Management Division. We're delighted that Dr. Clark Gibbs, who is currently Rockwell's BWIP director, will head that division for us.

Q. I've transferred from another Rockwell Division. Will my time be counted as it is now with RHO?

A. Hanford employees, whether they work for Rockwell, Westinghouse or another contractor, won't lose their service credit under provisions of their individual pension plans. Under the new contract, we are proposing to honor the service that is recognized by the current employer for pension vesting and vacation eligibility. In which case, former employees of Westinghouse and Boeing who now work for another contractor are

likely to get credit for their prior service if their current employer has accepted that time. This issue should be resolved within the next few months.

Q. With the takeover, will employees gain total time accumulated at Hanford even though that time may have been with several different contractors?

A. Probably not. Again, we plan to honor the service credits that are recognized by your current employer.

Q. I transferred from another Rockwell division to RHO 1-1/2 years ago and was eligible for the 85-point system at that time. Will I lose it?

A. It would be best for employees to contact their own benefits administrators for information on their current pension, stock and savings plans because these are tailored to individual

corporate programs. Members of our Personnel staff can answer questions about Westinghouse's program, but we are unfamiliar with those of the other contractors.

Q. What's my status between now and takeover?

A. Between now and our target takeover date of June 29, current employees will remain on the payroll of Westinghouse Hanford, BCS Richland, Rockwell Hanford or UNC Nuclear Industries.

Q. What about the drug/alcohol testing -- do you expect any change in this policy?

A. Like most Hanford contractors, Westinghouse currently requires applicants for employment to undergo a urinalysis for drugs and alcohol. We

expect that policy to continue. There has been no decision to extend drug and alcohol testing to current employees. Should there be any change in this policy, we would immediately communicate that to all employees.

ATTACHMENT D

WESTINGHOUSE HANFORD COMPANY
P. O. Box 1970
Richland, WA 99352

July 31, 1987

Mr. John R. Carver
P. O. Box 104
Richland, WA 99352

This letter will confirm information concerning the pension benefit you were receiving from Westinghouse Hanford Company (WHC) prior to consolidation. As provided in Sections 1.7(1) and 2.8 of the WHC Pension Plan text, and Section 4.8 of the "new" Operations and Engineering Pension Plan, this pension benefit was interrupted when you returned to the employ of WHC effective June 29, 1987.

Upon subsequent retirement, your pension benefit will be recalculated under the

provisions of the revised WHC/BCSR Operations and Engineering Pension Plan which became effective June 29, 1987. As provided under the "Grandfather" clause, you will receive the greater of the benefits calculated under the "old" Plan or the "new" Plan.

Presently, no pension benefits accrue for individuals who continue in employment beyond age 65. However, this provision will change effective January 1, 1988. After that date, employees over age 65 will accrue pension benefits on the same basis as other active employees.

If you have additional questions concerning your status or benefits, please contact Employee Benefits on 376-7190 or 376-6101.

S/ G. L. Clogston
Manager

Compensation and Benefits

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN CARVER, et al, and MARTIN L. HAGOOD,	)	No. C-88-582-AAM C-88-391-AAM
Plaintiffs,	)	O R D E R
vs.	)	
WESTINGHOUSE HANFORD COMPANY, et al,	)	
Defendants.	)	

On Thursday, July 5, 1990 at 11:00 a.m. in Yakima, Washington, the court heard the parties Cross-Motions for Summary Judgment. Alex J. Skalbania, Critchlow, Williams & Schuster, represented plaintiffs. Marvin L. Gray, Davis Wright Tremaine, appeared on behalf of defendants. After reviewing the cross-motions, including the memoranda in support and the entire court file, the court being fully informed in the above-

captioned matter, IT IS HEREBY ORDERED that plaintiffs' Cross-Motion for Summary Judgment be DENIED.

IT IS FURTHER ORDERED that defendants' Cross-Motion for Summary Judgment is GRANTED.

BACKGROUND FACTS

While the court hereby incorporates by reference the parties' lengthy and detailed fact stipulation (Ct. Rec. 35), a somewhat brief restatement of the facts shall also be recited in this order. The basic issue of this lawsuit involves a dispute as to whether plaintiffs are entitled to have certain periods of their prior employment with other employers restored so as to be recognized in the calculation of their pension benefits.

In 1986, the Department of Energy (DOE) decided to consolidate the primary

responsibility for maintaining day-to-day operation of the Hanford Nuclear Reservation (HNR) in the hands of one private contractor. Westinghouse Hanford Company (WHC, a defendant herein) was selected as the consolidated contractor and scheduled to accomplish the consolidation by June 29, 1987.

Among the many administrative matters that had to be resolved in connection with consolidation was an array of issues regarding pension plans. Prior to consolidation, UNC Nuclear Industries, Inc. (UNC), Rockwell Hanford Operations (RHO), Pacific Northwest Laboratories (Battelle), Boeing Computer Services Richland Operations (BCSR), and Westinghouse Hanford Co. (WHC) each operated its own pension plan for its own employees at the HNR. Because it was

anticipated that the large majority of the employees at the Hanford Site would become employees of the consolidated contractor at the time of the consolidation, it was decided prior to consolidation that a new site-wide pension plan should be adopted at the time of consolidation, into which the assets of the previous pension plans on the site would be merged.

The new site-wide pension plan was envisioned by WHC as a final pay plan with a graduated vesting schedule. Subject to certain exceptions and qualifications, the monthly retirement benefit (based upon a 10 year certain and life annuity) would be 1.6% of average monthly compensation over the "high five" compensation years, times the number of years (or fractional years) of employment

that were recognized under the plan. With similar exceptions and qualifications, employees were 60% vested after five years of service, rising to 100% after ten years of service.

One issue that needed to be resolved by WHC, and which has become the issue of this lawsuit, was the manner in which its employees, both old and new, would receive recognition under the provisions of the new pension plan for the years of service that they had previously accumulated with WHC and/or its affiliates, and/or with the other contractors at the HNR and/or with their affiliates.

Initially, WHC took the position that for the purpose of calculating an employee's benefits under the new site-wide pension plan, the plan should

recognize all of an employee's prior years of service (post 1965) at the HNR with WHC, RHO, BCSR, WHC and Battelle. The DOE, whose contract gave it the right of final approval over the terms of the new pension plan, took the position that only the years of service of an employee that were recognized by his or her employer immediately prior to consolidation should be recognized under the new pension plan. DOE and WHC also initially disputed the amount of prior service to be credited for determining the level of vesting.

The plaintiffs in this case were employees of predecessor DOE contractors at the Hanford site at and before consolidation. At the time of consolidation, each plaintiff became an employee of WHC with no material changes

in their job duties or salaries.

At or around the time of consolidation, WHC provided all of the potentially affected employees of all of the contractors, including the plaintiffs, with certain documents which informed them about how the conditions of their employment would be affected if they chose to become employees of WHC at the time of consolidation. Some of these documents contained information about the new proposed pension plan that was to take effect at the time of consolidation (Attachment C to Stipulation). The documents which comprise Attachment C are (1) three issues of a regularly published newsletter designed to keep employees informed about the consolidation, (2) a questionnaire regarding linking of prior service, and

(3) a booklet summarizing the highlights of the new consolidated pension plan. These documents which comprise Attachment C are the only written information which WHC provided to these individuals at or near the time of consolidation which informed them about their rights under the WHC pension plan.

The subject of credited prior service for both benefit calculation and vesting purposes was a topic of continuing discussions between WHC and DOE before and after the consolidation. Because of these and other issues, WHC did not adopt a formal written pension plan document until December, 1987. This formal plan document was not approved by DOE until March of 1989. The formal plan document provides that the plaintiffs and other similarly situated WHC employees

are not entitled to have their prior years of service with other Hanford contractors recognized for the purposes of calculating pension benefits unless those prior years of service were recognized for that purpose by the employer for whom the employee in question was working immediately prior to consolidation.

After accepting employment with WHC, and no later than the first half of 1988, while still employed by WHC, each of the plaintiffs learned that WHC would not calculate their retirement benefits in the manner the plaintiffs claim they ought to be calculated. That is, each plaintiff learned WHC would not give credit under its pension plan for his prior years of service at Hanford or elsewhere unless such service had been

recognized for the purpose of benefit calculation by the pension plan in which he participated immediately before consolidation.

Subsequently, plaintiffs John Carver, Al Sampson, Herbert Barrus, Bill McClung, Leonard Lust and Donald Meyers filed an action in this court under cause number C-88-391-RJM. Plaintiff Martin Hagood filed his action in state court and defendant Westinghouse removed the action to this court under cause number C-88-582-AAM. Jurisdiction is predicated upon 28 USC §1331 (federal question) because the claims arise under federal statute, 29 USC §1001 et. seq. (ERISA). Both the ERISA plan and the plan administrator have been named as defendants. The actions were consolidated and are now before the court

on the parties' cross-motions for summary judgment.

DISCUSSION

The plaintiffs have asserted three separate theories of recovery:

> (1) Adoption of the formal Hanford Operations and Engineering Pension Plan (HOEPP) in December, 1987 violated ERISA because, if effective, it would have resulted in an impermissible decrease in the amount of accrued benefits that had been earned as of December, 1987, and therefore it constitutes nothing but an ineffective amendment. Essentially, plaintiffs contend that Attachment C to the Stipulation is the governing ERISA plan in this case and that the HOEPP formal plan document adopted in December, 1987 is merely a failed amendment;
>
> (2) because of certain conduct and information that was conveyed to the plaintiffs, the administrator of the WHC pension plan should be estopped from administering the plan in a manner that fails to give them credit under the provisions of the plan for

benefit calculation purposes for the years of service for which the plaintiffs contend that they are entitled to receive credit; and

(3) provisions of the HOEPP, as interpreted and applied by the administrative committee, violate the provisions of 29 USC §1060(b). (asserted for the first time in plaintiffs' response to defendants' motion for summary judgment).

1. Background on ERISA

ERISA is a remedial statute designed to protect the interests of employees in pension and welfare plans and to protect employers from conflicting and inconsistent state and local regulation of such plans. See Shaw v. Delta Airlines, 463 U.S. 85 (1983). The former purpose is achieved through requirements for reporting, disclosure, participation rights, vesting or rights to benefits, funding, fiduciary responsibilities, and claims procedures. See 29 USC §§1021-

1145. The latter purpose is achieved through the preemption of all state laws relating to employee pension and welfare benefit plans. See 29 USC §1144.

ERISA creates federal causes of action for recovery of benefits due under pension and welfare plans, see 29 USC §1132(a)(1)(B), and for breach of fiduciary duty by plan fiduciaries, see 29 USC §§1109 and 1132(a)(2). ERISA, unfortunately, does not contain a body of contract law to govern the interpretation and enforcement of employee benefit plans. Scott v. Gulf Oil Corp., 754 F.2d 1499, 1501 (9th Cir., 1985). Instead, Congress intended for the courts, borrowing from state law where appropriate, and guided by the policies expressed in ERISA and other federal labor laws, to fashion a body of federal

common law to govern ERISA suits. Id.

2. Summary Judgment Standard

A party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). On a motion for summary judgment, this court must determine if a fair-minded jury could return a verdict for the nonmoving party. Id. at 252. The party seeking summary judgment must show that no genuine issues of material fact exists and that he is entitled to judgment as a matter of law by "pointing out" to the ocurt that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

Once the moving party has carried

its burden under Rule 56, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 586 (1986). The party opposing summary judgment must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. Celotex, 477 U.S. at 324. The nonmoving party may do this by use of affidavits (including his own), depositions, answers to interrogatories, and admissions. Id. If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. Matsushita, 475 U.S. at 587. However, all inferences drawn from the underlying facts must be viewed in the light most favorable to the party

opposing the motion. Id.

Based upon the parties' detailed fact stipulation, this court now finds that, while issues of fact remain, they are not material and thus, do not prevent resolution of this matter by summary means.

3. The Plan

The first issue that the court must resolve is to determine whether, as plaintiffs contend, a written summary of the plan document, questionnaire, and several newsletters distributed in 1987 are the written documents which comprise the governing pension plan (Attachment C to the Stipulation). In response, defendants claim that the controlling written document is the HOEPP formal plan document which was adopted by WHC in December, 1987 (Attachment E to the

Stipulation). In reply, plaintiffs argue that the HOEPP formal plan document is merely an ineffective amendment because it reduces the amount of benefits accrued under the documents contained in Attachment C, in violation of 29 USC §1054(g)(1). Plaintiffs' first claim is premised upon two contentions: (1) that the documents in Attachment C to the Stipulation constitute the governing written instrument of the ERISA plan and (2) that these documents affirmatively establish that all prior on-site service shall be restored and linked together for calculation of pension benefits. As set forth below, both of these contentions are erroneous.

Under ERISA,

> The terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was

> heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program --
>
> > (i) provides retirement income to employees, or
> >
> > (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . . .

29 USC §1002(2)(A). The Ninth Circuit has recognized that the existence of a written instrument is not a prerequisite to ERISA coverage, Scott, 754 F.2d 1503, and has thus defined "plan, fund, or program" quite broadly. "'Once it is determined that ERISA covers a plan, the Act's fiduciary and reporting procedures do require the plan to be established pursuant to a written instrument,

(citations omitted), but clearly these are only the responsibilities of administrators and fiduciaries of plans covered by ERISA and are not prerequisites to coverage under the Act.'" Id. at 1504, quoting Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir., 1982) (en banc). The Donovan court found that a "'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." Donovan, 688 F.2d 1373. It must be noted, however, that the Donovan court decided only that jurisdiction under ERISA existed. Plaintiffs' theory is based upon the argument that employee benefit plans that

are subject to ERISA can be established and governed by written instruments that do not rise to the level of a formal plan document.

Plaintiffs reliance upon Donovan appears misplaced because the defendants have never denied the existence of a pension plan nor have they contended that ERISA does not apply. While it cannot be disputed that there is no requirement of a formal, written plan in either ERISA's coverage section, 29 USC §1003(a) or its definition section, 29 USC §1002(1), it is also clear that once it is determined ERISA covers a plan, 29 USC §§1022 and 1102 require the plan to be established pursuant to a written instrument. Simply put, ERISA does not condition a plan's initial validity on whether it is in writing. More importantly, it is not the

plan's initial validity which is at issue in this case.

The cases upon which plaintiffs base their argument (Scott, 754 F.2d 1499; Donovan, 688 F.2d 1367; Robbins v. Lynch, 836 F.2d 330 (7th Cir., 1988)) involve circumstances in which the employers did not promulgate formal written employee benefit plans. In these cases it was necessary for the courts to resort to informal documents and evidence of pattern and practice to determine whether an employee benefit plan even existed and thus, was governed by ERISA. This court, however, is not obliged to resort to reliance upon such informal material or the surrounding circumstances because (1) ERISA coverage has never been denied and (2) a formal written pension plan exists - the Hanford Operations and Engineering

Pension Plan. (Attachment E to Stipulation).

ERISA mandates that pension plans conform to certain requirements. Specifically, under 29 USC §1102, every employee benefit plan shall provide for a named fiduciary who shall have authority to operate and administer the plan. The written plan shall also provide "a procedure for establishing and carrying out a funding policy," "describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan," "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan," and "specify the basis on which payments are made to and from the plan." 29 USC §1102(b).

It cannot be disputed that none of the documents in Attachment C, either separately or as a whole, satisfy the requirements of section 1102(b). As set forth in the introduction to the seven-page booklet entitled "Pension Plan for Non-Bargaining Unit Employees of WHC/BCSR" (contained in Attachment C):

> "This brochure contains the highlights of the revised multiple-employer pension plan effective June 29, 1987. You will receive a more detailed description of the plan in a few months. Since this brochure is only a summary of the formal plan document that controls operation of the pension plan, any questions concerning the specific interpretation or administration of the plan will be resolved based on actual provisions of the formal plan document."

Attachment C. Unlike plaintiffs would have the defendants and the court believe, this document is exactly what it

purports to be, "highlights of the revised multiple-employer pension plan effective June 29, 1987." The booklet specifically cautions that it is a summary of the formal plan document. It does not purport to be nor is it a written instrument in compliance with 29 USC §1102. Likewise, the other documents which comprise attachment C are precisely what they purport to be (three issues of a regularly published newsletter designed to keep employees informed about the consolidation and a questionnaire regarding linking of prior service) and not an ERISA plan.

Prior to consolidation, each of the on-site contractors (UNC, RHO, BCSR, and WHC) operated its own pension plan, governed by formal written instruments in compliance with ERISA. On the effective

date of consolidation, a multiple employer pension plan was established and the assets of all the predecessor plans were merged into the "new plan." The documents contained in Attachment C were disseminated prior to and at the time of consolidation in an effort to keep employees apprised of matters relating to the consolidation, including how their pension benefits would be effected. The plain language of the documents confirms their purpose. Any contention that these informal written communications (three newsletters, a questionnaire and a summary booklet) somehow constitute a formal written instrument which governs administration of the consolidated pension plan is erroneous. This is especially true in light of the fact that the predecessor plans were each

separately governed for years by formal written instruments.

Because the Attachment C documents are not the governing written instrument utilized to administer the consolidated pension plan, plaintiffs accrued no benefits under such documents. As a result, the rule against reduction of benefits does not apply (under 29 USC §1054(g)(1) the accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8)). Accordingly, plaintiffs' argument, that the HOEPP formal written document adopted in December of 1987 is merely an ineffective amendment to Attachment C because it reduced benefits accrued under the plan, must fail.

However, assuming arguendo, that the documents in Attachment C constitute the written instrument governing the consolidated pension plan, this court finds that they are not inconsistent with the formal HOEPP document adopted in December, 1987 with respect to the issue of linkage of service for calculation of pension benefits. Defendants assert that plaintiffs' motion for summary judgment rests on the contention that the documents in Attachment C affirmatively declare that prior service with all contractors would be restored for pension benefit calculation purposes. Defendants claim that such a contention is erroneous.

In the months preceding the consolidation, WHC and Rockwell published and distributed to UNC, BCS, Rockwell and

WHC employees, the Consolidated News, an information source regarding all aspects of the consolidation, which included information regarding pension plans. The Consolidated News dated March 20, 1987 includes the following questions and answers:

> "Q. I've transferred from another Rockwell Division. Will my time be counted as it is now with RHO?
>
> A. Hanford employees, whether they work for Rockwell, Westinghouse or another contractor, won't lose their service credit under provisions of their individual pension plans. Under the new contract, we are proposing to honor the service that is recognized by the current employer for pension vesting and vacation eligibility. In which case, former employees of Westinghouse and Boeing who now work for another contractor are likely to get credit for their prior service if their current employer has accepted that time. This issue should be resolved within the next few months.

Q. With the takeover, will employees gain total time accumulated at Hanford even though that time may have been with several different contractors?

A. Probably not. Again, we plan to honor the service credits that are recognized by your current employer.

Q. I transferred from another Rockwell division to RHO 1-1/2 years ago and was eligible for the 85-point system at that time. Will I lose it?

A. It would be best for employees to contact their own benefits administrators for information on their current pension, stock and savings plans because these are tailored to individual corporate programs. Members of our Personnel staff can answer questions about Westinghouse's program, but we are unfamiliar with those of the other contractors." (emphasis added)

In a subsequent issue under the heading "Continuity of Service Date," the April 17, 1987 Consolidated News states:

"The basic rule for determining

> your continuity of service date is simple. On transferring to WHC, you will be credited with the same service recognized by your current employer just prior to transfer, PLUS any prior service with WHC, BCSR, Westinghouse or Boeing. The restoration of prior Westinghouse or Boeing service is based on a long-standing Westinghouse and Boeing practice that carries over to the new company."

However, one paragraph later in the same Consolidated News under the heading "Pension Plan Service," it states:

> "Rules for determining service for pension plan purposes are considerably different and much more complex. In the near future, we will review how service dates for pension plan vesting and benefits will be determined under the new WHC pension plan and at the same time will provide you with the highlights of our new pension, savings and insurance plan."

Subsequently, WHC sent out to employees a memorandum and questionnaire entitled "Pension Plan Service Credits

For Non-Bargaining Unit Employees" which was designed to determine what prior service, if any, would be restored. The memorandum also contains language which supports defendants' position. Some excerpts are set forth below:

> "Many employees have service with more than one of the contractors involved in the O&E consolidation. And some also may have service with parent companies prior to transferring to Hanford. Such service may count for vesting and/or benefit purposes -- whether or not it counts for vacation purposes.
>
> First of all, the new WHC/BCSR Pension Plan will accept the same service recognized by your 'predecessor employer' as of June 28. Additionally, those who have prior service with one or more of the other contractors involved in the O&E consolidation <u>may</u>* also have all or a part of such service restored.
>
> * * *
>
> To ensure that you receive all of the service credits to which

> you are entitled, we are including a questionnaire in this benefits enrollment package. Please complete and return the questionnaire if you have prior service with any of the contractors or parent companies of the contractors involved in the O&E consolidation that has not been credited by your present employer. Your individual case will be reviewed and you will be notified if any service adjustment is to be made. While it may take weeks or months to complete all of these individual reviews, any pension service adjustments will be effective June 29 (retroactively, if necessary)."

The following language is contained in the questionnaire accompanied by the cover memorandum:

> "When you transfer to Westinghouse Hanford Company or BCS Richland effective June 29, you will take with you the service recognized by your 'predecessor employer' as of June 28. In addition, some of you may be eligible to have some prior service restored.
>
> * * *

> If you had prior service with BCSR, RHO, UNC, WHC or their parent Companies, which has not been credited by your present employer for pension plan purposes, such service may be restored depending on the specific circumstances in each case."
>
> ---
>
> *It should be noted, as defendants point out for the court, that in quoting this identical section in their memorandum in support of motion for summary judgment, the plaintiffs have conveniently changed the "may" to "will." Such a change significantly alters the meaning of this paragraph.

It is apparent to this court, upon review of Attachment C, that the questionnaire is just what it is entitled - a questionnaire designed to elicit information regarding restoration of service. Furthermore, the language of both the questionnaire and its cover memorandum clearly state only that prior

service may be restored. The questionnaire is unambiguous in its pronouncement that employees will take with them service recognized by their predecessor employer and that prior service with BCSR, RHO, WHC, UNC or their parent companies may be restored for pension plan purposes depending upon the specific circumstances of each case. Any other interpretation of the language is not only untenable, but also unreasonable.

Finally, plaintiffs contend that the summary booklet distributed in June of 1987 also supports their argument, On what is marked page two of the booklet, it states:

> "If you become a participant of the plan on June 29, 1987, you will receive credit for prior service in accordance with your prior plan's provisions; however, no credit will be

> given for service before January 1, 1965."

This paragraph is the only reference to restoration of prior service contained in the entire document. After reading the booklet several times, it is obvious that the use of the singular "plan's" is made in reference to only the employee's plan immediately prior to consolidation, leading this ocurt to conclude that the booklet states the position taken by the defendants and the position that is embodied in the HOEPP formal plan document (Attachment E) adopted in December, 1987, that employees are not entitled to have their prior years of service with other Hanford contractors recognized for the purpose of calculating their pension benefits unless those prior years of service were recognized for that purpose by the employer for whom the

employee in question was working immediately prior to consolidation.

Even if construed with extreme liberality and viewed in a light most favorable to the plaintiffs, the documents comprising Attachment C are at best, ambiguous on the subject of linking of prior service for calculation of pension benefits purposes. The documents unquestionably do not affirmatively demonstrate, as plaintiffs suggest, that they shall receive credit for all the prior service for which they are seeking in calculating their pension benefits. It is curious that the plaintiffs have failed to point out to the court any passage in the Attachment C documents which affirms their position. Consequently, even if the court were to consider these documents as the formal

written instrument which governs the consolidated pension plan, their plain language does not entitle the plaintiffs to the benefits which they seek.

The parties have stipulated, based on Attachment C, that the plaintiffs could reasonably believe that all of their prior years of service for all DOE contractors operating at the Hanford site from January 1, 1965 forward would be recognized under the new WHC pension plan for benefit calculation purposes. After reviewing the same documents, this court finds that while the plaintiffs may have reasonably believed they were entitled to such benefits, the plain language of the documents simply does not so entitle them. Accordingly, plaintiffs' first theory of recovery must fail.

4. Summary Plan Description

ERISA requires that the administrator of each employee benefit plan furnish to each participant a summary plan description. 29 USC §1021(a). The style and contents of the summary plan description which must be furnished to participants is set forth in 29 USC §1022. Courts have held that when a pension plan issues to its participants a summary plan which is inconsistent with the plan description, the participant's rights are governed by the summary plan provisions upon which he or she reasonably believes. McKnight v. Southern Life and Health Ins. Co., 758 F.2d 1566 (11th Cir., 1985); Kochendorfer v. Rockdale Sash & Trim Co., Inc., 653 F.Supp. 612 (N.D.Ill., 1987). The courts have so held because,

> "it is of no effect to publish and distribute a plan summary

> booklet designed to simplify and explain a voluminous and complex document, and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee for reasonably relying on the summary booklet."

McKnight, 758 F.2d at 1570.

Plaintiffs contend that the booklet summarizing the highlights of the pension plan is just such a summary plan description. The introduction to the booklet states "[t]his brochure is only a summary of the formal plan document that controls operation of the pension plan . . . ." (Attachment C to the Stipulation). In response, defendants contend that the booklet cannot be a "summary plan description" under ERISA because it does not comply with the requirements of 29 USC §1022(b). They further contend that even if the booklet

is an ERISA summary plan description, it is not inconsistent with defendants' position regarding linking of service for pension benefit calculation purposes. Any suggestion that a booklet describing itself as "a summary of the formal plan document" which contains "highlights of the revised multiple-employer pension plan" is not a summary plan description is meritless. Accordingly, this court will treat the booklet contained in Attachment C and entitled "Pension Plan for Non-Bargaining Unit Employees of WHC/BCSR" as a section 1022 summary plan description.

The parties have stipulated that at the time of consolidation and for a time thereafter, based upon all of the documents comprising Attachment C, that it was reasonable for plaintiffs to

believe that all of their prior years of service for all DOE contractors operating at the Hanford site would be recognized under the new pension plan for benefit calculation purposes. While the belief may have been reasonable based upon all of the documents in Attachment C, standing alone, the booklet does not support plaintiffs' position. As set forth in the pages above, the booklet in Attachment C which summarizes the plan contains but one paragraph on the linkage of service issue and is not inconsistent with the formal HOEPP plan adopted in December, 1987 with respect to such issue.

Furthermore, the Seventh Circuit has held that when the summary booklet expressly states that it is merely an outline of the pension plan and that the

formal text of the plan governs in the event a question arises, the plaintiffs cannot rely on the general statements of the booklet but must look to the plan itself. Kolentus v. Avco Corp., 798 F.2d 949 (7th Cir., 1986), cert. denied, 479 U.S. 1032 (1987). This is precisely the scenario that is presented in the instant case. The introduction to the summary booklet cautions that "since this brochure is only a summary of the formal plan document that controls operation of the pension plan, any questions concerning the specific interpretation or administration of the plan will be resolved based on actual provisions of the formal plan document." Plaintiffs' interpretation of the booklet can only be characterized as myopic. The plaintiffs focus in on a single paragraph which they

contend supports their theory of liability, yet they ignore the introductory paragraph which specifically cautions that the booklet is not the formal plan document and that any questions will be resolved based upon the actual provisions of the formal plan. This court cannot allow them to base liability upon such a theory.

5. Equitable Estoppel

Plaintiffs next assert that because of certain conduct and information that was conveyed to them, the administrator of the WHC pension plan should be estopped from administering the plan in a manner that fails to give them credit under the provisions of the plan for benefit calculation purposes for the years of service for which the plaintiffs contend that they are entitled to receive

credit. In response, defendants correctly argue that the defendant HOEPP plan may not be required by estoppel to make payments not authorized by its written terms. See Hansen v. Western Greyhound Retirement Plan, 859 F.2d 779, 781 (9th Cir., 1988); Davidian v. Southern California Meat Cutters Union, 859 F.2d 134, 135-36 (9th Cir., 1988). Accordingly, such a claim against the plan must be dismissed.

While plaintiffs cannot bring such a claim against the plan, the Ninth Circuit has not foreclosed an action against the plan's administrator. It held that "[e]ven though ERISA preempts common law theories of contract law, see Blau v. Del Monte Corp., 748 F.2d 1348, 1356-57 (9th Cir., 1984), cert. denied, 474 U.S. 865 (1985), the principles of equitable

estoppel apply to pension plans." Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1155 (9th Cir., 1986). In this circuit, equitable estoppel is available against a nongovernmental party (the administrator of the plan) who has made a knowing false representation, or concealment of material facts, to a party ignorant of the true facts, with the intention that the other party should rely on the representation, and the other party actually and detrimentally relied on it. Id. While plaintiffs' first theory of liability was amenable to disposition on summary judgment, the estoppel issue does not appear to be quite so resolvable because of disputed issues of fact regarding reliance. Furthermore, the plaintiffs' claims must be considered separately because it is

not clear that they were all privy to or relied upon the same representations. It is stipulated that all the plaintiffs received the documents included in Attachment C at or near the time of consolidation. As set forth below, however, there exist disputed issues of fact with respect to other information plaintiffs received regarding the linkage of service.

During the first several months after consolidation, and prior to the formal adoption by WHC of the HOEPP formal written document, at least three individuals who were similarly situated to the plaintiffs, retired and had their prior service (post-1965) on the site linked together for the purpose of calculating their pension benefits, even though certain portions of their prior

service were not recognized for this purpose by their employers prior to consolidation. There is a dispute whether and to what extent Mike Byrd, plan administrator, specifically authorized this treatment of prior service in these three cases. However, there is no dispute that Byrd became aware of the situation no later than early 1988 and that WHC did nothing for over one year. At that time WHC wrote the individuals stating that the original calculation of their benefits had been mistaken and that their benefits had been reduced.

In a most unhelpful fashion, the stipulation states that some of the plaintiffs were aware that all prior service on the site had been linked for the purpose of computing these three

employees' benefits and that other plaintiffs did not become aware of this fact until this lawsuit was begun.

The stipulation also states that some of the plaintiffs contend that they were receiving pension payments prior to consolidation which were based upon their years of service with WHC and other Westinghouse affiliates. Defendants deny this contention.

The stipulation further states that plaintiff Meyers will testify that oral statements were made to him by members of WHC's management personnel in July of 1985 to the effect that all of Mr. Meyers' prior years of service with WHC would be reconsolidated by WHC for pension benefit calculation purposes whenever Meyers returned to any subsidiary of the Westinghouse

organization. Westinghouse will offer no testimony to the contrary.

At some point not later than the first half of 1988, while still employed by Westinghouse, each of the plaintiffs learned that Westinghouse would not calculate their retirement benefits in the manner in which plaintiffs claim they ought to be calculated.

Most importantly, with respect to this particular issue, as set forth on pages 9-11 in the Stipulation, there are serious issues of fact with respect to the extent plaintiffs relied upon the facts as represented by the defendants.

Despite what appear to be genuine issues of material fact precluding summary judgment, this court finds that the plaintiffs' estoppel claim fails for another reason. As set forth above,

equitable estoppel is available against a party who has made a "knowing false representation." Dockray v. Phelps Dodge Corp., 801 F.2d at 1155. The parties have stipulated that "plaintiffs were not deliberately misled by WHC concerning their pension benefits. Any inaccurate or misleading information which was provided to them by WHC was the result of uncertainty or confusion, and was provided in good faith." (Stipulation, p. 12, ¶30). Based upon the stipulation, the defendants could have not made a knowing false representation. Thus, the doctrine of equitable estoppel is inapplicable and plaintiffs' claims based thereon must be dismissed.

In regards to plaintiffs' equitable estoppel claim, this court must note that plaintiffs have not been deprived of any

pension benefits which had accrued as of June 27, 1987. That is, under the new consolidated plan, plaintiffs are entitled to recognition of prior service for pension benefit calculation purposes to the identical extent as recognized by their employer immediately prior to consolidation. Simply put, if plaintiffs' pension plan immediately prior to the consolidation recognized prior service, then so does the new plan. By accepting employment with WHC, plaintiffs were deprived of nothing except the mistaken expectation that they were entitled to linkage of all prior on-site service with respect to pension benefit calculation purposes. The defendants have characterized the relief plaintiffs seek as a "windfall" because consolidation, which otherwise did not

change plaintiffs' job duties and compensation, allegedly brought them a substantial increase in their pensions. The court agrees with such a characterization.

6. Violation of 29 USC §1060(b)

In their response to defendants' cross-motion for summary judgment, plaintiffs, for the first time, raise an additional theory of recovery. Plaintiffs contend that provisions of the HOEPP, as interpreted and applied by the administrative committee, violate the provisions of 29 USC §1060(b). This section provides:

> "For purposes of this part and part 3--
>
> (1) in any case in which the employer maintains a plan of a predecessor employer, service for such predecessor employer shall be treated as service for the employer, and

> (2) in any case in which the employer maintains a plan which is not the plan maintained by a predecessor employer, service for such predecessor shall, to the extent provided in regulations prescribed by the Secretary of the Treasury, be treated as service for the employer."

29 USC §1060(b). (part 2 governs participation and vesting and part 3 governs funding). This particular section of the ERISA statute has received little treatment in the federal courts. This court could find only one reference to section 1060(b)(1) - Phillips v. Amoco Oil Co., 614 F.Supp. 694 (N.D. Ala., 1985), aff'd, 799 F.2d 1464 (11th Cir., 1986), cert. denied, 481 U.S. 1016 (1987). In Phillips the district court found that section 1060(b)(1) did not apply because the employer was not maintaining a plan of a predecessor employer. Accordingly, discussion on

that section was limited.

Plaintiffs claim that the defendants are maintaining the pre-consolidation plans of UNC, Rockwell, BCSR, as well as WHC's own pre-consolidation pension plan. They argue that section 1060(b)(1) mandates that their years of service for the predecessor employers be treated as service for their new employer. It should be noted that in quoting the statute, as defendants point out, plaintiffs have omitted the introductory language which limits application of section 1060 to parts 2 and 3 of ERISA.

In reply, defendants contend that section 1060(b)(1) requires that service for a predecessor employer be treated as service for the new employer for purposes of parts 2 and 3 of ERISA. They claim that these parts establish minimum

requirements for participation, vesting, funding and rate of accrual of benefits. They further argue that while section 1060(b) provides that in certain cases, service with the predecessor employer must be taken into account for the purpose of determining compliance with these requirements, it does not provide that such prior service must be taken into account in the plan formula or for the purpose of computing the amount of benefits under the plan.

The defendants argue, and this court agrees, that it is fundamental to the scheme of ERISA that it neither requires employers to adopt a pension plan nor establish any level of benefits that must be provided or any particular formula that must be used. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981).

They conclude that to read section 1060(b) as requiring a plan to take into account service with a predecessor employer in determining the amount of benefits would be contrary to this basic principle.

Defendants' argument has merit. By its literal terms, section 1060(b)(1) applies to only parts 2 and 3 of ERISA. As defendants point out, these sections establish minimum requirements for participation, vesting, funding, and rate of accrual of benefits. Under the terms of section 1060(b), service with the predecessor employer must be taken into account for the purpose of determining if the statutory minimums have been met for participation, vesting, funding, and rate of accrual of benefits, but not for the actual computation of benefits.

Furthermore, the statute mandates that when "the employer [WHC] maintains a plan of a predecessor employer [UNC, RHO, WHC, and BCSR], service for such predecessor shall be treated as service for the employer." This is precisely what WHC has done. Under the consolidated plan, employees are entitled to have prior years of service with other Hanford contractors recognized for the purpose of calculating their pension benefits if those prior years of service were recognized for that purpose by the predecessor employer for whom the employee in question was working immediately prior to consolidation.

This court finds no merit in plaintiffs' third theory of liability.

7. Attorneys' Fees

Plaintiffs also move for attorneys'

fees as the prevailing party. Because plaintiffs have not prevailed, they are not entitled to attorneys' fees and thus, their request is hereby denied.

IT IS SO ORDERED. The Clerk shall enter this Order and forward copies to counsel.

DONE this 17th day of July, 1990.

S/ Alan A. McDonald
United States District Judge

(Filed in U. S. Dist. Ct., E.D. of Wash., 7/18/90)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN CARVER, et al	)	C-88-391-AAM
	)	C-88-582-AAM
vs.	)	
	)	JUDGMENT IN A
WESTINGHOUSE HANFORD CO.	)	CIVIL CASE
	)	

DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgment be entered for the Defendant.

Date: August 2, 1990

JAMES R. LARSEN, Clerk

S/ Barbara A. Speer, Deputy Clerk

(Filed 8/2/90)

Alex J. Skalbania
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P. O. Box 1487
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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN CARVER, et al,	)	C-88-391-AAM
	)	Consolidated w/
Plaintiffs,	)	C-88-582-AAM
	)	
vs.	)	MOTION FOR
	)	RECONSIDERATION
WESTINGHOUSE HANFORD	)	
COMPANY, et al,	)	
	)	
Defendants.	)	

COME NOW the plaintffs in the above-entitled cause, by and through their attorneys of record herein, CRITCHLOW, WILLIAMS & SCHUSTER, per Alex J. Skalbania, and, pursuant to Federal Rule of Civil Procedure 59 and Federal Rule of Civil Procedure 6, hereby request the court to reconsider its Order in this

matter dated July 18, 1990 and to enter an Order granting the plaintiffs' Motion for Summary Judgment and denying defendants' Motion for Summary Judgment for the reasons that are set forth in the accompanying Memorandum in Support of Plaintiffs' Motion for Reconsideration.

DATED: This 1st day of August, 1990.

CRITCHLOW, WILLIAMS & SCHUSTER
Attorneys for Plaintiffs

By: S/ Alex J. Skalbania
WSBA #15412

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN CARVER, et al, and MARTIN L. HAGOOD,	)	C-88-391-AAM C-88-582-AAM
Plaintiffs,	)	O R D E R
vs.	)	
WESTINGHOUSE HANFORD COMPANY, et al,	)	
Defendants.	)	

Plaintiffs' Motion for Reconsideration came before the court upon hearing without oral argument. Alex Skalbania appeared on behalf of plaintiffs. Marvin Gray represented defendants. After reviewing plaintiffs' motion, including the memorandum in support and the entire court record, the court being fully advised in this matter,

IT IS HEREBY ORDERED that the plaintiffs' Motion for Reconsideration be

DENIED.

DISCUSSION

In the above-captioned case, plaintiffs move, pursuant to Fed. R. Civ. P. 59(e), for reconsideration of this court's order granting defendants' cross-motion for summary judgment and denying plaintiffs' cross-motion for summary judgment. The motion, however, raises no new legal arguments nor does it set forth any new evidence. Instead, it is merely a reargument of those identical theories asserted on summary judgment.

A motion for reconsideration of summary judgment is appropriately brought under Rule 59(e). Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir., 1985). Such a motion is properly denied where the movant presents no arguments that had not already been raised in opposition to

summary judgment. Id.

As the defendants aptly point out in their response, plaintiffs' motion (while lengthy, detailed and overlength, 22 pages 1 and 1/2 spaced rather than the requisite double spaced) is nothing but an attempt at another bite at the apple. The motion presents no new evidence or legal authority, but is instead a rehash of arguments presented on summary judgment. Accordingly, it shall be summarily denied.

Defendants also move for Rule 11 sanctions in the form of costs incurred in responding to plaintiffs' motion for reconsideration. The Ninth Circuit has upheld a district court's award of Rule 11 sanctions upon finding a Rule 59(e) motion frivolous because it introduced nothing new. MGIC Indem. Corp. v.

Weisman, 803 F.2d 500, 505 (9th Cir., 1986). Upon reflection, however, this court shall not impose such sanctions.

IT IS SO ORDERED. The Clerk shall enter this Order and forward copies to counsel.

DATED: This 10th day of September, 1990.

S/ Alan A. McDonald
United States District Judge

(Filed 9/10/90)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN CARVER, et al,	)	C-88-391-AAM
	)	Consolidated w/
Plaintiffs,	)	C-88-582-AAM
	)	
vs.	)	NOTICE OF APPEAL
	)	
WESTINGHOUSE HANFORD COMPANY, et al,	)	
	)	
Defendants.	)	

NOTICE IS HEREBY GIVEN to defendants, Westinghouse Hanford Company, et al and to Marvin L. Gray, Jr., DAVIS WRIGHT TREMAINE, 2600 Century Square, 1501 Fourth Avenue, Seattle, WA 98101-1688, counsel of record herein for said defendants, that plaintiffs, John Carver, et al, hereby appeal to the Court of

Appeals for the Ninth Circuit from that certain Order granting defendants' Cross-Motion for Summary Judgment and denying plaintiffs' Cross-Motion for Summary Judgment entered in the above-entitled cause on July 18, 1990, and from that certain subsequent Order denying plaintiffs' Motion for Reconsideration entered herein on September 10, 1990.

DATED: This 18th day of September, 1990.

CRITCHLOW, WILLIAMS & SCHUSTER
Attorneys for Plaintiffs

By: S/ Alex J. Skalbania
WSBA #15412

(Filed 9/20/90)

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN CARVER, AL SAMPSON, HERBERT BARRUS, BILL McCLUNG LEONARD L. LUST, DONALD J. MEYERS,	)	No. 91-35002 D.C. No. CV-88-391-AAM
Plaintiffs-Appellants,	)	O P I N I O N
v.	)	
WESTINGHOUSE HANFORD COMPANY, a corporation; HANFORD OPERATIONS AND ENGINEERING PENSION PLAN,	)	
Defendants-Appellees.	)	

Appeal from the
United States District Court
for the Eastern District
of Washington
Alan A. McDonald, District Judge,
Presiding

Argued and Submitted
July 11, 1991 - Seattle, Washington

Filed December 17, 1991

Before: Dorothy W. Nelson,
John T. Noonan, Jr. and

Thomas G. Nelson, Circuit Judges

Opinion by Judge T.G. Nelson

SUMMARY

ERISA

Affirming a district court grant of summary judgment, the court of appeals held that the district court had properly determined that an employer's ERISA pension plan properly failed to recognize prior employee service for other contractors at the Hanford Nuclear Reservation.

Appellant John Carver and other employees brought a claim under ERISA to challenge Westinghouse Hanford Company's refusal to recognize prior employee service for other contractors at the Hanford Nuclear Reservation. Appellants were employees of predecessor DOE

contractors now employed at the nuclear reservation without any changes in their salaries or employment status. At the time of consolidation of the activities at the nuclear plant, WHC provided documents to employees explaining the ramification of the consolidation to their employment status and benefits. Included were documents explaining the new proposed pension plan that was to take effect at the time of consolidation. On cross motions for summary judgment, the district court found in favor of WHC.

[1] The district court found appellants' argument that the documents they received established a pension plan unconvincing. In Scott, for example, the court noted that the existence of a written instrument is not necessarily a prerequisite to ERISA coverage. [2]

Although WHC never denied the existence of a pension plan, it denied that the documents in question were to be the binding informal plan. [3] The court stated that WHC should have explained in its communications that the plan was not formalized and was subject to DOE approval. However, its failure to do so did not elevate the documents in question to the level of an informal ERISA plan. [4] In addition, the documents were consistent with the plan subsequently formalized and did not violate §1054(g) of ERISA.

[5] The court rejected appellants' argument that the plan administrator should be equitably estopped from interpreting the plan in a manner that does not give them credit for the time they believe they deserve. Any

inaccurate or misleading information that was provided was the result of uncertainty or confusion, and was provided in good faith. [6] The court held that lacking any false representation or concealment of material facts, the appellants could not prevail on their allegation that WHC concealed material facts. [7] 29 USC §1060(b) does not require WHC to tack the years of service accrued for the predecessor employers onto the pension plan adopted by WHC. [8] Accordingly, the court agreed with the Eleventh Circuit that ERISA does not require a successor employer to credit years of service with the predecessor employer where the successor does not maintain the benefit plan of the predecessor. [9] Phillips, Alessi and a literal reading of section

1060(b) supported the court's conclusion that WHC was not required to add the prior service to the benefits computation.

COUNSEL

Alex J. Skalbania, Critchlow, Williams & Schuster, Richland, Washington, for the plaintiffs-appellants.

Marvin L. Gray, Jr., Davis, Wright & Tremaine, Seattle, Washington, for the defendants-appellees.

OPINION

T. G. NELSON, Circuit Judge:

John Carver and his fellow employees appeal the district court's grant of summary judgment in favor of Westinghouse Hanford Company (WHC) in their action under the Employees Retirement Income Security Act (ERISA), 29 USC §§1001-1461. The appellants allege that WHC's Operating and Engineering Pension Plan

(HOEP Plan) improperly failed to recognize prior service for other contractors at the Hanford Nuclear Reservation (HNR). We affirm the summary judgment.

FACTS AND PROCEEDINGS BELOW

The parties have stipulated to the following facts. In 1986 the Department of Energy (DOE) decided to consolidate the primary responsibility for daily operation of the HNR in the hands of one private contractor. WHC was selected and the consolidation was to be completed by June 29, 1987. Prior to consolidation each contractor operated its own pension plan for its own employees. Since most of these employees would then work under the consolidated contractor, it was decided prior to consolidation that a reservation pension plan should be

adopted into which the assets of the previous pension plans would be merged.

WHC's "final pay" plan had a graduated vesting schedule. The monthly retirement benefit would generally be 1.6% of average monthly compensation over the highest five compensation years, multiplied by the number of years of employment that were recognized under the plan. Employees were 60% vested after five years of service and 100% vested after ten years.

WHC recognized that there would be a question as to how employees would receive recognition under the new pension plan for the years of service previously accumulated at HNR under all of the various contractors. Subject to DOE approval, WHC initially intended that the new plan would recognize all of an

employee's prior years of service at HNR after 1965. The DOE, however, determined that only the employees' years of service that were recognized by his or her employer for pension purposes immediately prior to consolidation should be recognized under the new pension plan.

As a result of extended negotiations between the DOE and WHC, the final pension plan was not adopted until December, 1987. It ultimately received DOE approval in March, 1989, nearly two years after consolidation of operations into WHC had been completed. In the interim, WHC attempted to keep its employees informed as to their rights under the new pension plan.

The plaintiffs in this case were employees of predecessor DOE contractors now employed at WHC with no material

changes in their job duties or salaries. At the time of consolidation, June, 1987, WHC provided documents to employees explaining the ramification of the consolidation to their employment status and benefits. Included were papers ocntaining information regarding the new proposed pension plan that was to take effect at the time of consolidation. The documents consisted of: (1) a questionnaire regarding linking of prior service; (2) three issues of a regularly published newsletter designed to keep employees informed about the consolidation; and (3) a booklet summarizing the highlights of the new consolidated pension plan. These documents were identified as "Attachment C" to the Stipulation and were the only documents provided to the employees

between June and December, 1987, when WHC formally adopted the pension plan.

After accepting employment with WHC, the plaintiffs learned that the consolidated company would not calculate their retirement benefits based on the entirety of periods of service with prior contractors. WHC ultimately adopted the DOE position and would not give credit under its pension plan for prior years of service at Hanford or elsewhere unless such service would have been recognized by the pension plan in which the employee participated immediately before consolidation. On cross motions for summary judgment, the district court decided in favor of WHC. This appeal resulted. We affirm.

STANDARD OF REVIEW

A grant of summary judgment is

reviewed de novo. Kruso v. Int'l. Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir., 1989). The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Tzung v. State Farm Fire & Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir., 1989).

DISCUSSION

I

ERISA is a remedial statute which Congress enacted to protect employee pension benefit rights and to protect employers from conflicting and inconsistent state and local regulations of pension benefit plans. Shaw v. Delta Air Lines, 463 U.S. 85, 90-91 (1983). A

pension bneefit plan may be created even without a formal intentional plan adoption if "from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir., 1982) (en banc).

In this case, one of the basic contentions of the appellants is that the informal documents described as Attachment C, the questionnaires, the newsletter, and the preliminary summary booklet, established a pension plan. They argue further that the formal plan eventually adopted in December, 1987, reduced the benefits established by the Attachment C documents. As an amendment

reducing benefits, their argument goes, the formal plan is in violation of 29 USC §1054(g) and §1082(c)(8).*

---

*29 USC §1054(g) provides "the accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in . . . 29 USC §1082(c)(8)." Section 1082(c)(8) provides further that no amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary . . . [of Labor] . . . notifying him of such amendment and the Secretary has approved such amendment or, within ninety (90) days after the date on which such notice was filed, has failed to disapprove such amendment. . . .

[1] The district court found this argument unconvincing. First, it found the cases cited by the appellants inapposite. See Donovan, Scott v. Gulf Oil, 754 F.2d 1499 (9th Cir., 1985); Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir., 1985). Each of these cases discussed the variety of ways a de facto pension plan could be created through surrounding circumstances. In Scott, for example, the court noted that the existence of a written instrument is not necessarily a prerequisite to ERISA coverage (citing Donovan). Informal actions could create coverage if the surrounding circumstances would indicate to a reasonable man that benefits exist. Donovan at 1373. The district court found the appellants' reliance on these cases misplaced because "the defendants

have never denied the existence of a pension plan nor have they contended that ERISA does not apply." Excerpts of Record at 28. ("E.R.")

[2] Although WHC never denied the existence of a pension plan, it does deny that the Attachment C documents were to be the binding informal plan as of June, 1987. The purpose of the documents was to apprise anxious employees of what they might expect once the transition from several employers to WHC was completed, WHC had not completed its negotiations with DOE, and consequently, had not adopted a plan.

Donovan explains that intent to create a plan is not enough:

> A decision to extend benefits is not the establishment of a plan or program. Acts or events that record, exemplify or implement the decision will be direct or circumstantial

> evidence that the decision has become reality . . . assuring employees that a plan or program exists [for example] - but it is the reality of a plan, fund or program and not the decision to extend certain benefits that is determinative.

Id. at 1373.

[3] WHC should have explained in its communications that the plan was not formalized and was subject to DOE approval. Failure to do so, however, did not elevate the newsletters and the preliminary summary booklet to the level of an informal plan in June, 1987. The plan simply was not a reality until that December when it was formally adopted.

[4] Moreover, the documents were consistent with the plan formalized in December as well as the final summary booklet and, therefore, did not violate §1054(g). While each of the documents discusses the accrual of prior service,

the most recognition the documents provide of prior service was that employees would take with them service recognized by their immediate predecessor employers and that prior service might be restored depending on the specific circumstances of each employee. The June, 1987, summary booklet, which makes only one reference to this issue, states:

> If you become a participant of the plan on June 29, 1987, you will receive credit for prior service in accordance with your prior plan's provision; however, no credit will be given for service before January 1, 1965.

E.R. 66C.

The district court noted:

> This paragraph is the only reference to restoration of prior service contained in the entire document. After reading the booklet several times, it is obvious that the use of the singular "plan's" is made in reference to only the employee's plan immediately